

STATE OF MICHIGAN
COURT OF APPEALS

SAMUEL L. BASNER, JR.,

Plaintiff-Appellant,

v

LARRY H. WERTH and ERIC COLMUS,

Defendants-Appellees.

UNPUBLISHED

June 27, 2006

No. 267236

Genesee Circuit Court

LC No. 04-079939-NI

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant Larry H. Werth's motion for summary disposition and dismissing the claims against defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On September 9, 2002, plaintiff was a passenger in a truck driven by Werth and owned by defendant Eric Colmus. Werth was towing a trailer when he lost control of the truck. Plaintiff, then twenty-nine years old, complained of pain and some numbness in his fingers after the accident. He was taken to the emergency room and admitted to the hospital, where he was diagnosed with an avulsion fracture of his C2 neck vertebra with no displacement, a chest contusion, and lumbar sprain. An MRI revealed a herniated disk between his C5 and C6 vertebrae. Plaintiff also suffered an injury to his left eye.

Plaintiff sued to recover noneconomic damages. Werth moved for summary disposition under MCR 2.116(C)(10) and argued that plaintiff's injuries did not meet the serious impairment threshold necessary for recovery. The trial court assumed for the purpose of the motion that plaintiff had presented an objective manifestation of an impairment to an important body function. However, the trial court then found that plaintiff had failed to demonstrate that his general ability to lead his normal life had been affected by the injury. In reaching this decision, the trial court found that, while some residual impairment continued with respect to plaintiff's neck injury, "the extent of any residual impairment that's medically documented seems to be pretty limited." The trial court granted Werth's motion and also dismissed the case against Colmus.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Under MCL 500.3135, a person is subject to tort liability for noneconomic loss caused by his use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. As used in this section, “serious impairment of body function” is defined as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), our Supreme Court provided a framework for determining whether a plaintiff meets the serious impairment threshold. First, a court is to determine whether a factual dispute exists “concerning the nature and extent of the person’s injuries; or if there is a factual dispute, . . . [whether] it is . . . material to the determination whether the person has suffered a serious impairment of body function.” *Id.* at 131-132. If there are material factual disputes, a court may not decide the issue as a matter of law. *Id.* at 132. If no material question of fact exists regarding the nature and extent of the plaintiff’s injuries, the question is one of law. *Id.*

When a court decides the issue as a matter of law, it must then proceed to the second step in the analysis and determine whether “an ‘important body function’ of the plaintiff has been impaired.” *Id.* When a court finds an objectively manifested impairment of an important body function, “it then must determine if the impairment affects the plaintiff’s general ability to lead his or her normal life.” *Id.* This involves an examination of the plaintiff’s life before and after the accident. *Id.* The court should objectively determine whether any change in lifestyle “has actually affected the plaintiff’s ‘general ability’ to conduct the course of his life.” *Id.* at 133. “Merely ‘any effect’ on the plaintiff’s life is insufficient, because a de minimus effect would not, as objectively viewed, affect the plaintiff’s ‘general ability’ to lead his life.” *Id.* at 133 (emphasis in original). The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. *Id.* These factors include:

(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. [*Id.*]

In addition, “[s]pecific activities should be examined with an understanding that not all activities have the same significance in a person’s overall life.” *Id.* at 131. Thus, where limitations on sporting activities “might not rise to the level of a serious impairment of body function for some people, in a person who regularly participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function.” *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005). However, “[a] negative effect on a particular aspect of an injured person’s life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life.” *Kreiner, supra* at 137.

Specifically in regard to residual impairments, the *Kreiner* Court noted, “Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.” *Id.* at 133 n 17. However, we have held that “[t]he necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment.” *McDaniel v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005). A physician need not offer a medically identifiable or physiological

basis for imposing restrictions based on pain; however, a recitation of a physiological basis provides support for the conclusion that the restrictions are physician-imposed, rather than self-imposed. *Id.* at 284-285. In addition, we have recognized the difference between self-imposed limitations due to pain and self-imposed limitations based on physical inability, which can support a finding that the plaintiff has suffered a threshold injury. *Id.* at 283.

In the instant case, plaintiff has arguably shown the objective manifestation of an injury that, at least initially, impaired an important body function, given that physician records support a conclusion that plaintiff injured his neck, back, and eye in the accident. However, we conclude that plaintiff has failed to show that his initial injuries, when coupled with any residual effects, changed his general ability to lead his normal life under the standard set out in *Kreiner, supra*.

Indeed, we agree with the trial court's assessment of the factors outlined above. We note that the nature and extent of plaintiff's initial impairments do not approach those suffered by the plaintiff Straub in the companion case to *Kreiner, supra*, or by the plaintiff Kreiner himself.

Plaintiff relies almost entirely on the work restriction given to him in June 2003 to refute the trial court's findings that he recovered relatively quickly and that his level of residual impairment is slight. However, plaintiff focuses on these lifting restrictions in support of his claim while ignoring the later doctor reports documenting his substantial recovery. This leads to an inference that the continued work restrictions were solely based on a subjective complaint of pain. This conclusion is supported by the evidence from both parties that indicated that plaintiff actually could continue to work. In fact, evidence indicated that plaintiff returned to work approximately one week after the accident. An independent medical examiner stated that the condition of plaintiff's hands indicated that plaintiff was routinely performing manual labor. Plaintiff also admitted that he went to a worker's compensation evaluation where his claim was denied, and the doctor who examined him at that time stated that he could return to work. Plaintiff further indicated that he planned to start a siding business with his uncle, and plaintiff provided inconsistent testimony about his previous and current levels of employment. Despite the issuance of an initial work restriction, we conclude that plaintiff has not presented any objective evidence to support his claims that his injuries substantially impacted his ability to work.

In addition, plaintiff has not shown that any of his other claimed limitations to his pre-accident activities were due to anything other than self-imposed pain restrictions, which cannot be used to establish a threshold injury. Under the circumstances, we agree with the trial court's finding that the duration of the impairment, and the extent of any residual impairment, was relatively limited.

Therefore, we agree with the trial court's finding that, while plaintiff has demonstrated some interruption with his normal life activities, he has failed to meet his burden of establishing a threshold injury.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter